

MISCELLANEOUS CIVIL APPLICATION NO. 344 OF 2001.

Commissioner of Customs and  
Central Excise, Goa.

... Applicant.

Versus

M/s. Primella Sanitary Products  
(P) Ltd., Cortalim, Goa.

... Respondent.

Mr. V.P. Thali, Senior Central Government Standing Counsel  
for the Applicant.

Mr. H.K. Maingi, Advocate for the Respondent.

Coram: A.S. AGUIAR &  
P.V. HARDAS, JJ.

Date of reserving the Order: 15-1-2002.

Date of pronouncing the Order: 18-2-2002.

O R D E R (PER HARDAS, J.)

This is an application filed by the Commissioner of Customs and Central Excise, Goa, under Sub-Section (1) of Section 35H of the Central Excise Act, 1944 praying that this Court should direct the Appellate Tribunal to refer to this Court the questions of law, which are reproduced below:-

"1. Whether the agreement made between M/s. Christine Hoden (I) Pvt. Ltd. & M/s. Primella Sanitary Products Pvt. Ltd. for transfer of registered trade mark 'Comfit' alongwith logo is valid in the absence of registration with the proper authority in terms of the Trade & Merchandise Marks Act, 1958?

2. Whether in the absence of registration of the agreement with the proper authority, M/s. Primella Sanitary Products Pvt. Ltd., Cortalim would not be eligible to avail the benefits of Notification 175/86 CE dated 1/3/86 as

amended and Notification 1/93 dated 28/2/93 in view of Para 7 of Notification 175/86 CE dated 1/3/86 and Para 4 of Notification 1/93 dated 28/2/93?"

2. The brief facts necessary for the decision of this application are set out hereunder:-

The respondent M/s. Primella Hoden (I) Pvt. Ltd., had filed two classification lists No. 60/92-93 with effect from 1/3/93 and No. 6/93-94 with effect from 1/4/93 whereby the respondent claimed the benefit of Exemption Notification No. 175/86-CE dated 1/3/86 and the Exemption Notification No. 1/93-CE dated 28/2/93. In the aforesaid two classification lists, the respondent had described its product under the brand name of 'Comfit Always'.

3. Under Notification No. 175/86-CE and under Notification No. 1/93-CE the rate of duty based on the value of clearance is reproduced below:-

"(1) Notification No. 175/86-CE

Rate of duty for first clearance  
of Rs. 30 lakhs - Nil

Rate of duty for the next  
clearances of Rs. 55 lakhs - Less 10%  
of the  
normal  
rate of  
duty.

(2) Notification No. 1/93-CE

Rate of duty for first clearance  
of Rs. 30 lakhs - Nil

Rate of duty for next clearances  
of Rs. 20 lakhs - Less 10%

of the  
normal  
rate of  
duty.

Rate of duty for next clearances  
of Rs. 25 lakhs

- Less 5%  
of the  
normal  
rate of  
duty."

A show cause notice, dated 29th June 1993, was issued to the respondent calling upon the respondent to show cause as to why the benefit of the Exemption Notification should not be denied to the respondent since the respondent was using the brand name 'Comfit Always' belonging to M/s. Christine Hoden (I) Pvt. Ltd.. In paragraph 1 of the application it is stated that the show cause notice was issued to the respondent as the respondent was using the brand name 'Comfit', which is a registered trade mark of M/s. Christine Hoden (I) Pvt. Ltd., and which was not eligible for the benefits under the said Notifications. The show cause notice dated 29th June 1993 is filed with the application and is at Exhibit 'A'. It is stated in the first paragraph of the show cause notice that the respondent had filed two classification lists for its product 'sanitary napkins' bearing brand name 'Comfit Always' belonging to M/s. Christine Hoden (I) Pvt. Ltd.. Thus, it is apparent that the show cause notice was issued under an assumption that the brand name 'Comfit Always' belonged to M/s. Christine Hoden (I) Pvt. Ltd..

4. The respondent filed its reply to the show

cause notice on 11th October 1993 and in the reply it was pointed out that the brand name used by the respondent is 'Comfit Always' and the respondent is the sole manufacturer. The respondent also pointed out that the product under the aforesaid brand name was not being manufactured by M/s. Christine Hoden (I) Pvt. Ltd..

5. The Assistant Collector of Central Excise in his finding held that 'Comfit' is a registered trade mark of M/s. Christine Hoden (I) Pvt. Ltd., and, therefore, denied the respondent the benefit of the Exemption Notifications. The appeal filed by the respondent against the Order of the Assistant Collector of Central Excise was also dismissed. The respondent, thereafter, filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, hereinafter referred to as CEGAT for the sake of brevity. The CEGAT accepted the contention of the respondent that by a Deed of Assignment, dated 28th June 1987, between Christine Hoden (I) Pvt. Ltd., and the respondent the label 'Comfit Always' with bird device was transferred by Christine Hoden (I) Pvt. Ltd., to the respondent for a consideration of Rs. 100/-. The CEGAT ultimately held that the failure to obtain the permission from the Trade Mark Authority by itself does not result in the transfer of the trade mark to the present respondent from Christine Hoden (I) Pvt. Ltd., ineffective. The CEGAT, therefore, concluded that paragraph 7 of the Notification No. 175/86

and paragraph 4 of Notification No. 1/93 would not apply. In other words, the CEGAT held that the Exemption Notifications would apply to the respondent. Paragraphs 7 and 4 of the Notifications are reproduced hereunder:-

"7. The exemption contained in this notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under this notification; .....

4. The exemption contained in this notification shall not apply to the specified goods, bearing a brand name or trade name (registered or not) of another person: .....".

6. On the basis of the finding of the CEGAT, therefore this application under Section 35H of the Central Excise Act, 1944.

7. We have heard Mr. Thali, the learned counsel appearing for the applicant and Mr. Maingi, learned counsel for the respondent. The learned counsel for the respondent has filed a detailed reply and his principal ground for contending that the present application is not maintainable is that the issue relates to the determination of the question having relation to the rate of duty of excise or to the value of goods for the purpose of assessment and, therefore, no reference to the High Court under Section 35H of the Central Excise Act is tenable. He has also urged that the issue raised by the applicant does not arise out of

the Order of the Tribunal and, therefore, a reference application under Section 35H of the Central Excise Act is not tenable.

8. The learned counsel appearing for the respondent has placed reliance on the Judgment of the Supreme Court in **Navin Chemicals Mfg. & Trading Co. Ltd. v Collector of Customs**, reported in 1993 (68) E.L.T. 3 (S.C.). The learned counsel has relied on paragraphs 7 and 11 of the aforesaid Judgment of the Supreme Court. Paragraphs 7 and 11 read as under:-

"7. The controversy, therefore, relates to the meaning to be given to the expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment'. It seems to us that the key lies in the words 'for purposes of assessment' therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal must be heard by a Special Bench. Similarly, where the appeal involves the determination of any question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench. Cases that relate to the rate of customs duty for the purposes of assessment and which relate to the value of goods for the purposes of assessment are advisedly treated separately and placed before Special Benches for decision because they, more often than not, are of importance not only to the importers who are parties thereto but also to many other importers who import or propose to import the same or similar goods. Since the decisions of CEGAT in such matters would have wide application they are, by the terms of the statute, to

be rendered by Special Benches. The phrase 'relation to' is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

11. It will be seen that sub-section (5) uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation says that the expression includes the determination of a question relating to the rate of duty, to the valuation of goods for purposes of assessment, to the classification of goods under the Tariff and whether or not they are covered by an exemption notification, and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and

proximately as to the rate of duty or the value of the goods."

9. The entire proceedings against the respondent were initiated on the ground that the respondent was not entitled to claim the benefit of the provisions of the two Exemption Notification on the ground that the brand name 'Comfit' belonged to M/s. Christine Hoden (I) Pvt. Ltd., and since the turnover of M/s. Christine Hoden (I) Pvt. Ltd., had crossed two crores, the benefit under the said Notifications could not be extended to M/s. Christine Hoden (I) Pvt. Ltd.. Thus, the question was whether the respondent was entitled to claim the benefit of the Exemption Notifications or to pay the excise duty at the rate chargeable for concerns denied the exemption. In the aforesaid Judgment of the Supreme Court in Navin Chemicals Mfg. & Trading Co. Ltd. (supra), the Supreme Court has clearly held that a dispute as to the classification of goods and as to whether or not they are covered by an Exemption Notification relates directly or proximately to the rate of duty applicable thereto for the purposes of assessment. The Supreme Court further held that where the value of the goods for the purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of the goods for the purposes of assessment.

10. Section 35H of the Central Excise Act, 1944 prohibits the Commissioner of Central Excise or the other

party from making an application to the High Court for directing the appellate Tribunal to refer any question of law arising from such Order of the Tribunal against an Order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purposes of assessment. We, therefore, find considerable force in the submission of the learned counsel for the respondent that the application filed by the applicant raises issue which relates to the determination of a question having relation to the rate of duty of excise or to the value of the goods for the purposes of assessment and, as such, a reference under Section 35H of the Central Excise Act, 1944 is not maintainable.

11. In the result, therefore, in view of the aforesaid discussion, Miscellaneous Civil Application is dismissed.

(A.S. AGUIAR)  
JUDGE.

(P.V. HARDAS)  
JUDGE.

ed's.